IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 94/2015
SCZ/8/108/2015

Civil Jurisdiction

BETWEEN:

STANDARD CHARTERED BANK (Z) PLC **APPELLANT**

AND

JOHN M. C. BANDA **RESPONDENT**

Coram: **Wood, Malila and Musonda, JJS**

On 5th December, 2017 and 8th December, 2017

For the appellant: Ms. N. M. Mulenga of Isaac and Co., Agent for Messrs Ventus and Co.

For the respondent: Mr. B. C. Mutale of BC Legal Practitioners

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JUDGEMENT

Malila, JS, delivered the judgment of the court.

Cases referred to:

1. *The Republic of Botswana, Ministry of Works, Transport and Communications, Rincean Design Consultants (sued as a firm T/A KZ Architects v. Mitre Limited (SCZ Judgment No. 2 of 1995*
2. *Leopold Walford (Z) Limited v. Unifreight (1985) ZR 203.*
3. *Harkness v. Bell's Asbestos and Engineering Limited (1966) 3 ALLER.*
4. *Freddy Hirsh Group Limited v. Food Lovers Lusaka Limited, 2013/HP/0443.*
5. *D. E. Nkuwa v. Lusaka Tyre Services Limited (1977) ZR 43.*
6. *Nahar Investments Limited v. Grindlays Bank International (Z) Limited (1984) ZR 81.*
7. *Access Bank (Z) Limited v. Group Fire/ZCON, SCZ/8/52/2014.*

Legislation referred to:

1. *Order 2 Rule 1 of the Supreme Court Rules (White Book, 1999 edition).*

Other works referred to:

1. *Her Majesty's Supreme Court.*

The appellant had issued in the High Court a writ of summons accompanied with a statement of claim against the respondent. The chief claim was for an order for payment of the sum of K66,618.89 allegedly outstanding on a loan facility availed to the respondent by the appellant. The writ had duly endorsed on it the name and the address - physical and postal, of the appellant's advocates as well as the physical address of the appellant. Regrettably for the appellant, neither the electronic address for the appellant nor the appellant's advocates was endorsed on the writ of summons. The appellant's advocates' electronic address was, however, included in the statement of claim. This omission enlivened the respondent to take out an application to set aside the writ for irregularity.

In the affidavit in support of summons to set aside process for irregularity sworn by the respondent, it was averred, *inter alia*:

> **5. That I am duly advised by any Advocates and verily believe the same to be true, that the originating process served upon my is irregular as the plaintiff failed to endorse it with his full address as is legally required which is likely to prejudice in the event the matter is decided in my favour and costs awarded as it will be difficult to locate the plaintiff.**

The respondent argued, in the lower court, that in terms of Order VII Rule 2(1) of the High Court rules, chapter 27 of the laws of Zambia, a plaintiff is obliged to endorse upon a writ of summons his place of residence, postal and electronic mail address and his occupation. This the appellant failed to do with the result that the process issued was irregular and liable to be set aside.

The appellant opposed the application. In an affidavit sworn in opposition by Mwansa Kapeya on behalf of the appellant, the appellant admitted having inadvertently omitted to have endorsed its electronic address on the writ of summons but that its advocate's electronic mail address was endorsed on the statement of claim. The appellant also averred that there would

be no prejudice resulting from that omission on the respondent's part as the appellant's physical address was fully endorsed on the statement of claim, and the electronic address plays no significant role in locating a plaintiff. Furthermore, that the appellant has a presence though out of the Republic.

After hearing the parties on the application to set aside, the learned judge in the court below agreed with the respondent. She held that the writ as issued was irregular and was, therefore, liable to be set aside. She quoted Statutory Instrument No. 27 of 2012 which reads that:

> **Advocates of a plaintiff suing by an advocate shall endorse upon the writ of summons the physical, postal and electronic address of the plaintiff.**

In the present circumstances, the judge found that the appellant had fallen foul of this rule and the originating process was thus irregular. She rejected the appellant's argument regarding absence of prejudice to the respondent, holding that "the very fact that the defendant has appeared on an obviously irregular writ of summons is prejudice enough." The judge thus set aside the appellant's writ of summons for irregularity.

Befuddled by that ruling, the appellant has now appealed on one ground, namely that the lower court judge erred in law and in fact when she set aside the appellant's writ of summons for irregularity as the rule in question was merely regulatory and its breach was thus curable.

At the hearing of the appeal, Ms. Mulenga, who appeared for the appellant, informed us that her instruction was to rely on the heads of argument filed in court by the appellant's advocates on 24th June, 2017. Mr. Mutale, counsel for the respondent, applied for leave to file the respondent's heads of argument out of time. As there was no objection from Ms. Mulenga, we granted the application. The respondent's heads of argument were thus filed.

In the heads of argument filed on behalf of the appellant, it was contended that no actual prejudice was occasioned to the respondent by reason of the omission of the electronic mail address on the writ as the electronic mail address that was omitted could not possibly affect the location of the appellant in the unlikely event that judgment was entered in his favour.

Counsel quoted Order 2 Rule 1 of the Supreme Court Rules (White Book, 1999 edition) which reads as follows:

> **Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.**

Counsel for the appellant also cited our judgment in **The Republic of Botswana, Ministry of Works, Transport and Communications, Rincean Design Consultants (sued as a firm T/A KZ Architects v. Mitre Limited**[1] where we stated *inter alia* that:

> **The High Court Rules were rules of procedure and were therefore regulatory and any breach should be treated as a mere irregularity which is curable.**

Counsel also referred to the case of **Leopold Walford (Z) Limited v. Unifreight**[2]. In that case, as in the present, the non-compliance with the rules related to failure to endorse the plaintiff's address on the writ of summons. We held that as a general rule, breach of a regulatory rule is curable and not fatal.

We thus set aside the High Court order striking out the writ. We also ordered amendment of the writ.

In an effort to develop its argument, the appellant went further to quote from the case of **Harkness v. Bell's Asbestos and Engineering Limited**[3] where the English Court of Appeal stated that:

> **Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without prejudice.**
>
> **It is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.**

Counsel ended by referring us to some case authorities where the courts have emphasized the desirability of having matters concluded and determined on the merits rather than on technicalities. We were thus urged to uphold the appeal.

Mr. Mutale, for his part, relied on the heads of argument which he had earlier at the hearing been granted leave to file. In those heads of argument, the learned counsel for the respondent maintained the position he had taken in the lower court, namely that an omission of an electronic mail address on the writ of

summons by the plaintiff was a breach of Order VII Rule 1 of the High Court Rules which rendered the proceedings liable to be set aside as they in fact were by the lower court. The learned counsel quoted the High Court judgment in the case of **Freddy Hirsh Group Limited v. Food Lovers Lusaka Limited[4],** where the court held that failure by the plaintiff to endorse his physical, electronic and postal address on the writ of summons rendered the summons irregular and thus liable to be set aside. Mr. Mutale was quick to point out that we are not bound by that High Court decision.

The learned counsel for the respondent then made the point that although the irregularity comprised in an omission of an address on a writ is curable, the appellant should have made a timely application to amend the originating process and thus cure the defect. Citing the cases of **D. E. Nkuwa v. Lusaka Tyre Services Limited[5]** and **Nahar Investments Limited v. Grindlays Bank International (Z) Limited[6]**, counsel submitted that parties who fail to make timely applications to rectify otherwise curable defects in the originating process or in the taking of any action necessary to progress their action do so at their own peril

As we understand counsel's argument, in the present case, the appellant failed to make an application to rectify the omission on the writ. The respondent applied to set aside, and the appellant did not and has not made any application to amend the writ.

We were urged to dismiss the appeal.

We have taken full note of the arguments put forward by counsel for the parties in this case. The issue for determination is plain. Was the learned judge below right in setting aside the writ for irregularity?

There is no dispute whatsoever between the parties that the writ of summons filed in this case was not compliant with Order VII Rule 2 of the High Court Rules as read together with Statutory Instrument No. 27 of 2012. The disagreement is over what the consequences should attend the failure to observe that rule.

We have stated in a number of case authorities that rules of court ought to be complied with and a party who breaches them does so at his or her own peril. We, of course, will be doing no one in this appeal any favour it we attempted to recite those

case authorities. Suffice it to state that we did in the case of **Access Bank (Z) Limited v. Group Fire/ZCON**[7], review those authorities, indicating when and when not a party that may have fallen foul of the rules of court may be allowed to proceed as if no breach had occurred and/or be directed to effect appropriate amendments. Yet we were also firmly alive to the fact that rules should generally not be used as a minefield for parties who make fairly inadvertent mistakes that translate into no tangible prejudice to the other party. If an irregularity can be cured without undue prejudice then it is desirable that such irregularity be put right subject to an order as to costs against the erring party.

In the case of **Leopold Walford (Z) Limited v. Unifreight**[2] which has been referred to by both parties in this appeal, we held that:

> **As a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings.**

We proceeded in that case to set aside the High Court order which set the writ of summons aside for irregularity for its omission of the plaintiff's address. We noted in that case,

however, that the plaintiff had in fact made an application to amend the writ so as to correct the anomaly. That application had, however, not been determined at the time the appeal was heard. We note, however, that in the present case, no similar application was ever made.

At the hearing of the appeal, we asked the learned counsel for the appellant whether this court could make an order to amend the writ so as to comply with the rules in the absence of an application. Ms. Mulenga intimated that this court has the power to do so. We agree that we do indeed have inherent power to make such an order. A party in breach of the rules should, however, always take the initiative to prompt the court by way of an application before the other party makes its own application to set aside. In this regard, our approach regarding a party in breach of a rule – which is curable by an order following an appropriate application - is the same as that we have adopted in regard to failure to meet set time lines. A party who sits back until there is an application by the innocent party to set aside process does so at his or her own peril.

In the present case, we note that it was the electronic mail address of the appellant that was omitted from the writ. We also considered the prejudice the respondent claimed he would suffer or was likely to suffer from that omission. We think that rules of court should indeed serve a definitive purpose and we are not to apply them using a rigid approach without regard whatsoever to the consequences of any delayed rectification of their breach. In case of breach of rules that do not result in any real or serious prejudice or negative consequences to any party, the court does surely retain the discretion always as to what order would best meet the justice of the situation.

When we asked Mr. Mutale whether indeed such prejudice as claimed by the respondent in paragraph 5 of his affidavit which we earlier in this judgment quoted was real, Mr. Mutale conceded that it was not. He thus agreed that the appeal be allowed subject to the appellant being ordered to pay costs.

In these circumstances, we are inclined to allow the appeal. We set aside the High Court ruling appealed against and direct that the appellant attends to curing the defect in the writ within 14 days.

Costs to the respondent.

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A. M. WOOD

SUPREME COURT JUDGE

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Dr. M. MALILA, SC

SUPREME COURT JUDGE

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M. MUSONDA, SC

SUPREME COURT JUDGE